No. 4570

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

W. G. CRITZER,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

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STATEMENT OF THE CASE

An information was filed by the United States Attorney for the District of Idaho, by leave of the court first had and obtained, charging the plaintiff in error W. G. Critzer, together with John Doe Hayden, in three counts, the first count alleging the possession of twenty-three sacks of Canadian bonded liquor in violation of law, the second count with the

transportation of tweny-three sacks of Canadian bonded liquor in violation of law and the third count being a libel against the automobile used in the transportation of the intoxicating liquor referred to in the first and second counts. (Tr. pp. 11, 12, 13, 14 and 15.)

The plaintiff in error was found guilty on all three counts of the information and Joe Doe Hayden was acquitted on all counts. (Tr. p. 16).

The plaintiff in error W. G. Critzer filed a motion in arrest of judgment and, in the alternative, for a new trial (Tr. p. 35), which motion was denied and exception allowed. (Tr. p. 40).

Plaintiff in error was sentenced to pay a fine of Two Hundred and Fifty and no-100 Dollars ($250.00) on the first count and Five Hundred and no-100 Dollars ($500.00) on the second count. (Tr. p. 42).

The case is here on writ of error.

FACTS

The Government relies upon the testimony of Deputy Sheriff C. R. Knight, who resides at Bonners Ferry, Boundary County, Idaho, W. F. Dunning, Sheriff, residing at Bonners Ferry, Boundary County, Idaho, Deputy Sheriff W. C. Welch, who resides at Bonners Ferry, Boundary County, Idaho, John J. Conway, residing at Deep Creek, Idaho,

George R. Hesser, a federal prohibition agent, stationed at Sandpoint, Idaho, Theresa Hatchett, the postmistress at Moravia, Idaho, Emma Simmons, residing at Moravia, Idaho, E. E. Crandall, a special agent of the telephone company, residing at Spokane, Washington, D. E. Dunning, city license inspector and secertary to the Commissioner of Public Safety, at Spokane, Washington, Clarence March, a police officer of Spokane, Washington, and A. C. Henry, prosecuting attorney of Boundary County. The evidence was substantially as follows:

C. R. Knight, deputy sheriff of Boundary County, on the evening of November 7, 1923, in company with Sheriff Dunning, and Deputy Sheriff Welch, received a report that a couple of cars were coming through that night or the morning of the 8th; they drove to a point near Deep Creek and placed some obstacles across the road. About half past four of the morning of the 8th of November, 1923, three cars approached, one jumping the barricade and proceeding westerly. The second car did likewise and that the third car turned easterly; that they took after the one which went easterly, but being unable to locate the car, returned to the point where they had erected the barrier; that at a point about one-half mile west of where the barrier had been erected, they found a Hudson automobile standing in the roadway, stuck in the mud, with twenty-three cases of whiskey piled along the side of the car; that the car was in

the middle of the road in a swampy place and that it would not have been possible for another car to have passed there when the car in question was in the roadway; that the car in question was a Hudson car, 1923, touring; that a driver's license was attached to a little card on the switch with the name of W. G. Critzer upon it; that he saw the second car, the Hudson car referred to, stop in the roadway after going over the barrier and that no other cars had passed that point; that Moravia is about a mile and a quarter by road from this point and is the closest post office. (Tr. pp. 17 and 18).

The witness W. F. Dunning, sheriff, residing at Bonners Ferry, Idaho, testified that on the evening of November 7, 1923, he, in company with the deputies Knight and Welch, went to a point near Deep Creek, his testimony being substantially the same as Knight's in regard to the cars coming and the location of the Hudson car with a plate on the steering wheel having the name of W. G. Critzer on it and also that on account of the position of the car in the swamp no other car could have passed; he testified further that he employed a team to haul the car and whiskey to Bonners Ferry and turned the liquor over to Federal Prohibition Agent Hesser. (Tr. pp. 18 and 19).

The witness W. C. Welch testified that he was a deputy sheriff of Boundary County residing at Bonners Ferry, Idaho, and that he made the trip with Sheriff Dunning and Deputy Sheriff Knight to a

point near Deep Creek. His testimony was substantially the same as the witness Dunning and witness Knight with the exception that he did not testify in regard to the license plate being on the car with the name of W. G. Critzer on it.

The witness John J. Conway testified that he resided near Deep Creek and that on the morning of November 8th Sheriff Dunning came to his place and employed him and his team to assist him in pulling an automobile that was in the roadway. (Tr. p. 20).

The witness George R. Hesser testified that he was a federal prohibition agent stationed at Sandpoint, Idaho; that on November 12, 1923, a Hudson car and intoxicating liquor were turned over to him and by him placed in storage at Coeur d'Alene; that the car bore a Washington license in a leather card case and bore the name of W. G. Critzer; he identified the five sacks of liquor which were received in evidence and without objection and admitted to be intoxicating liquor. The plaintiff in error W. G. Critzer admitted at this time that the car in question belonged to the defendant Critzer and was the car referred to and correctly described in Count Three of the information. (Tr. p. 21).

The witness Theresa Hatchett testified that she was the postmistress at Moravia, Idaho, and that on the morning of November 8, 1923, a gentleman called at her house and asked if he might use the phone; that she could not recognize the man; that the man

wanted to call up Spokane and wanted Main 606; that he tried to get the call through and couldn't and that she called for him and central asked what the name was and he said Hayden; that it was about nine or half past nine in the morning; that the man said he had been wading through the wet grass and that he was cold; that there was no one else present at the time except her mother Emma Simmmons; that she did not hear any part of the conversation between the parties and that she kept no record of the transaction; she testified further that all she did was to put in the telephone call and that she did not hear any conversation. (Tr. pp. 21 and 22).

The witness Emma Simmons testified that she resides at Moravia, Idaho, with her daughter Theresa Hatchett, at the post office and store; that on November 8, 1923, a man called at the post office and store; that she could not recognize any one in the court room as the man who entered the post office and store on the morning of November 8, 1923; that the man wanted to know if he could telephone and that he called Main 606 at Spokane and gave his name as Hayden; that she heard what he had to say over the phone and that he said: "Is this Louie? Tell Joe, I have lost everything—Will be in on 43;" and he further said, "Look out for Grant." His clothes were damp and he spoke about coming through the wet grass and weeds. (Tr. p. 23).

The witness E. E. Crandall testified that he was

employed as a special agent of the telephone company and that he had access to and was in custody of the records of the telephone company; that application for a license for Main 606 at Spokane was made by the Elite Cigar Store, South 7th Stevens Street, Spokane, signed by R. J. Critzer; that on the 7th day of November, 1923, the Elite Cigar Store at South 7th Stevens Street had for its telephone number Main 606. (Tr. pp. 23 and 24).

The witness D. E. Dunning testified that he is city license inspector and secretary to the Commissioner of Public Safety at Spokane; that on April 5, 1923, application for soft drink license for South 7th Stevens Street, Spokane, was made by W. G. Critzer, and that it was signed W. G. Critzer by R. J. Critzer; that a license was therefore issued on May 1, 1923, to W. G. Critzer to conduct a soft drink business at South 7th Stevens Street, Spokane; that he had occasion to visit the place of business prior to and up to November 8, 1923, and that Grant Critzer was in charge; that one of the brothers of W. G. Critzer is named Louie. (Tr. p. 24).

The witness Clarence Marcy testified that he was police officer at Spokane, Washington; that the Elite Cigar store is located at South 7th Stevens Street, Spokane. (Tr. p. 24).

The witness A. C. Henry testified that he was prosecuting attorney of Boundary County and was such on November 8, 1923; that he was acquainted

with a man named Hayden, he did not know his first name; that the Hayden he was acquainted with was the plaintiff in error W. G. Critzer; that he saw the plaintiff in error and the other defendant in the room at the Commercial Hotel in Bonners Ferry some time in November; that a man named Jones took him to the hotel and that Jones said, "This man is in trouble." That he looked over to him and said, "What are you in trouble about?" He said, "I lost my car and I lost my booze down here at Deep Creek." The witness testified that he was not sure that he had ever seen the defendant Hayden before, but that he thought he was the man with Critzer, the plaintiff in error, at the Commercial Hotel, but that he would swear positively as to the plaintiff in error. (Tr. p. 25). That Critzer, the plaintiff in error, was introduced to him as Hayden; that he did not tell him his name was Critzer. (Tr. p. 26.)

The following witnesses were called on behalf of the plaintiff in error W. G. Critzer and the defendant Ray W. Hayden:

The witness Frank Keenan testified that he was a police officer at Spokane, having been such for fourteen years; that he was acquainted with W. G. Critzer, one of the defendants.

It was at this time admitted by the Government that Mr. Critzer was in Spokane on the 8th day of November, 1923, during the early morning and that

it was not the contention of the Government that he was at Bonners Ferry that day.

The defendant Ray J. Hayden testified that he was living at Spokane on November 7, 1923, at the American Hotel, where he had been living from six to nine months prior to that time; that he was acquainted with the plaintiff in error W. G. Critzer, having met him before the trial of this case; that he had never operated the Hudson automobile referred to; that he was not driving said automobile on November 7th or November 8th in the vicnity of Moravia; that he had never ridden or driven it before that time; he testified that he had never been in the town of Bonners Ferry; that he had never seen the witness Henry; that he was never in Bonners Ferry with plaintiff in error Critzer; that he followed the occupation of salesman, selling automobiles and trucks; that he had not sold any automobiles or trucks for eighteen months; that he worked for a time selling tires but had not sold any for about eighteen months; that he worked for a time as a cigar clerk in the Court cigar store; that he was not employed in November, and had not worked since June, 1923; that he was laid off on account of bad health. (Tr. p. 28).

The plaintiff in error W. G. Critzer testified as follows: That he has two brothers named R. J. Critzer and L. E. Critzer; that R. J. Critzer, who made the application for the license for the Elite Cigar Store at Spokane, is a brother of plaintiff in

error; that he operated the Elite Cigar store at Spokane until the first of July, when he went to Californi, coming back on the 18th of August, and that he never operated the cigar store after the first of July; that he is acquainted with his co-defendant, Ray Hayden, and that on November 7th or 8th, he did not lend the car in question to Hayden and did not permit him to drive it and never knew of him having driven the car; that he first learned that the car had been seized about ten o'clock in the morning of November 8th, the information being given to him by Frank Keenan, detective at Spokane; that he was not out of Spokane at any time on the 7th or the morning of the 8th; that he was not driving the automobile in question in the vicinity of Bonners Ferry; that after he had been informed that his car had been seized, he went to the John Doran Company of Spokane, who had a mortgage on the car and that in company with the bookkeeper of that firm he went to Bonners Ferry, Idaho, and talked with Mr. Henry, prosecuting attorney; that Ray Hayden was not with him at that time; that he had not seen Mr. Henry before that time; that he knew Mr. Henry was prosecuting attorney; that he told Mr. Henry the car had been seized and that the John Doran Company had a mortgage on it and that Henry asked him if he had brought the papers with him and that he said he would go back to Spokane and bring them up; that he did not tell Henry that he had lost his car and booze and that he did not know that it was being used for

the transportation of intoxicating liquor at that time. He further testified that a man by the name of Martin B. Ackerman, a man whom he had met in Montana in 1917 when they were working in the woods, was driving the car at the time in question; that he had known Ackerman for some time, but that he had never had any business relations with him; that Ackerman had been in Spokane for about a month and roomed right around the corner from his place, that Ackerman was not doing anything, and that he would see him nearly every night, used to ride home with plaintiff in error nearly every night; that Ackerman told him he was going hunting and that he, Critzer, let him have the car on the morning of the 7th; that he did not know for sure where Ackerman was living but thought he was living at the Montana Hotel or the Empire. (Tr. p. 31). That he never returned after November 7th; that he made inquiries right after this but was unable to find out anything about him; that Ackerman had never communicated with him after the car had been seized. The plaintiff in error Critzer testified that he and his wife had the Big Bend Hotel; that he owned the Elite Cigar Store at Spokane; that he opened up for business in April and left about the middle of June for California; that he came back about August 20th and that he sold his interest; that the telephone number of the store was Main 606; that he was in the taxi business from the spring of 1919 to 1921, but not before or since; that

he sold cars for a year when he had a chance, was not a salesman but worked on a commission. (Tr. p. 32).

The witness Harry Hayden, called on behalf of the defendant, testified that he was a brother of Ray Hayden, one of the defendants; that his brother was living at the American Hotel during the month of November, 1923; that he had been living there for about nine months; that his brother Ray Hayden was around Spokane during the early part of November about the time he was arrested, but that he did not know where he was on November 7th or 8th. (Tr. p. 32).

The plaintiff in error W. G. Critzer was recalled to the stand and testified that a Mr. Bray, bookkeeper for John Doran Company at Spokane, was with him at Bonners Ferry; that he returned to Bonners Ferry, talked with Mr. Henry and showed him papers; that the other man was a Mr. Jones from Sandpoint. (Tr. p. 33.)

After the plaintiff in error W. G. Critzer rested, the witness A. C. Henry was re-called and testified that Critzer never did come to his office, but that a man representing some automobile concern in Spokane came along to his office a few days after the conversation in the hotel with the plaintiff in error Critzer and another man. (Tr. p. 33).

BRIEF OF THE ARGUMENT

1. A motion made for a directed verdict on the

grounds of insufficiency of the evidence made at the close of the Government's case is waived when defendant introduces evidence and fails to re-new the motion at the close of the case.

> Prosser v. United States, 265 Fed. 252;
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> Trelease v. United States, 266 Fed. 886;
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> Castle v. United States, 233 Fed. 855;
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> Burton v. United States, 102 Fed. 157.
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> Simpson v. United States, 184 Fed. 817;
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> Blackstone v. United States, 261 Fed. 150;
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> Sanders v. United States, 213 Fed. 573.

2. That the denial by the court of plaintiff in error's motion challenging the sufficiency of the evidence to justify submission of the same to the jury was not an abuse of discretion and is, therefore, not error.

> Ketterly v. United States, (9th Circuit) 193 Fed. 561;
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> Wilberg v. United States, 163 U. S. 632, 41 L. Ed. 289;
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> Beavers v. United States, 3 Fed. (2nd) 861;
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> Clark v. United States, 298 Fed. 293;
>
> Remus v. United States, 291 Fed. 513;
>
> Riddle v. United States, 279 Fed. 216;
>
> DeBolt v. United States, 353 Fed. 78.

3. That the verdict of the jury was not inconsistent or repugnant but rather is entirely consistent and it was not error for the court to deny the motion in arrest of judgment and the motion for a new trial.

Andrews v. United States, (9th Circuit), 244 Fed. 418;

Bar v. United States, (9th Circuit), 251 Fed. 339;

Zoline's Federal Criminal Law and Procedure, Vol. 1, page 388;

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. 861;

Zoline's Federal Criminal Law and Procedure, Vol. 1, page 384.

4. That the facts in the Government's case in chief were sufficient to permit the Government to go to the jury.

ARGUMENT

The assignments of error will be taken in their numerical order.

Assignment No. 1 is predicated upon the action of Judge Dietrich in refusing to grant the motion of the plaintiff in error W. G. Critzer made at the conclusion of the Government's case for a directed verdict. After the judge's denial of this motion, evidence was introduced on the part of plaintiff in error and after all the evidence was in, the motion for a directed verdict was not renewed. Under a long line of authorities, it is established that a failure to renew a motion for a directed verdict made at the conclusion of the Government's case, after all the evidence is in, amounts to a waiver of the question of the sufficiency of the evidence.

In the case of Castle v. United States, 233 Fed. 855, (6th Circuit), the court, in discussing the question of failure to renew a motion for directed verdict at the close of the entire case, uses the following language:

> "The assignment concerning denial of motion to direct a verdict is not available to plaintiff in error since the alleged error was waived by the introduction of evidence for the defendants."

Again in Burton v. United States, 142 Fed. 102 Fed. 157, (8th Circuit), the court said:

> "The motion to direct a verdict is waived when the defendant introduces evidence. If the motion is renewed after all the evidence is in, then the court, in passing upon the question, must consider the entire evidence, that of the defendant as well as that of the plaintiff."

Also, in the case of Prosser v. United States, 265 Fed. 252, the precise question here presented was disposed of by the Circuit Court of Appeals, Eighth Circuit, as follows:

> "It is alleged that the court erred in overruling the request of the defendants for an instructed verdict in their favor. This motion was made at the close of the introduction of testimony when all the testimony in chief on the part of the Government was in and was not renewed when all the testimony in the case had been presented. The objection was therefore waived."

We do not feel that it would serve any good purpose

to take up the court's time by quoting further cases on this point. The authorities listed under point 1 of the brief of the argument all sustain the above authorities.

It is the contention of the Government that the evidence introduced in its cases in chief was amply sufficient to warrant the court in denying the motion for a directed verdict and in submitting the case to the jury. Counsel for plaintiff in error strenuously insists that there is nothing in the evidence connecting plaintiff in error with the commission of the crime. His contention in this respect becomes absolutely untenable upon a fair consideration of the evidence.

The evidence shows that the car in which the liquor was found was the admitted property of the defendant W. G. Critzer. It is further shown that on the morning of the night the car was found, a party appeared at Moravia, the nearest post office to the place where the car was found and called up No. Main 606, Spokane, Washington, which was proven to be the phone number of the place of business of plaintiff in error in Spokane. Furthermore, the party who put in the call asked for Louie, who, the evidence shows, was the brother of the plaintiff in error and "stated that he lost everything" and also requested the party with whom the conversation was had to watch out for Grant, which is plaintiff in error's middle name. In addition to this, plaintiff in error appeared in person shortly after the car was found at Bonners Ferry,

Idaho, and there had a conversation with the prosecuting attorney A. C. Henry concerning the car which was in the custody of the officers. He at that time stated:

> "I lost my car and I lost my booze down here at Deep Creek."

Deep Creek being the place near which the Hudson car was found. (Tr. p. 25).

The witness Henry positively identified plaintiff in error as the man with whom he had this conversation. Certainly this evidence was ample to justify the trial court in refusing defendant's motion for a directed verdict and also sufficient to warrant in connecting plaintiff in error with the possession of the liquor found in the car. It is well settled that a motion for a directed verdict should only be granted where, as a matter of law, the court can say there is no evidence to justify the submission of the case to the jury.

In the case of Ketterly v. United States, 193 Fed. 561, this court, having under consideration a motion for a directed verdict, says:

> "A motion for a directed verdict leaves open to the court the question of whether there was any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. * * * * The weight of the evidence and the extent to which it was explained or contradicted were questions exclusively for the jury."

The Supreme Court of the United States, in the case of Wilberg v. United States, 163 U. S. 632, 41 L. Ed., 289, announces practically the same rule as stated by this court in Ketterly v. United States, supra.

In the case of Remus v. United States, 291 Fed. 513, the court held:

> "Motion for a directed verdict necessarily admits for purpose of motion, truth of evidence offered on behalf of the Government."

Again, in case of DeBolt v. United States, 253 Fed. 78, it is held:

> "It is the duty of the court in considering a motion, to take the view of the evidence most favorable to the party against whom it is desired to direct a verdict and from the evidence and inferences reasonably and justifiably drawn therefrom to determine whether or not under the law a verdict should be directed."

Other authorities appearing under point 2 of brief of argument will be found to be similar to the above authorities.

Applying the rules established by the foregoing authorities to the case at bar, it would seem clear that the trial court could do nothing else but deny defendant's motion for a directed verdict.

II.

For the purpose of argument, the Government de-

sires to consider assignments II, III, IV, V and VI together as they resolve on the same questions, namely, the sufficiency of the evidence and the consistency of the verdict of the jury. However, before taking up the consideration of the merits of these assignments, there are certain matters that we would call to the attention of the court in regard to each of the particular assignments.

Assignment III attacks the ruling of the court denying defendant's motion in arrest of judgment. It will be observed on an examination of the showing made in support of the motion in arrest of judgment that the entire matter rested on the question of the sufficiency of the evidence. We think it well established that a judgment in a criminal case can only be arrested for a matter appearing on the face of the record and in this connection the record of the evidence is not considered.

> "The law is well settled that a judgment in a criminal case will, after conviction, be arrested only for a matter appearing of record which would render the judgment erroneous if given; or for a matter which should appear and does not appear on the record; *the evidence being no part of the record* for such purpose."

> Zoline's Federal Criminal Law and Procedure, Vol. 1, page 388.

The showing made by plaintiff in error in support of his motion in arrest of judgment goes entirely to the question of evidence and would, therefore, be ab-

solutely insufficient to authorize an arrest of judgment. It is also announced by this court that a denial of a motion in arrest of judgment is not reviewable by writ of error.

> Andrews v. United States (9 Circuit), 224 Fed. 418;
>
> Barr v. United States (9th Circuit), 251 Fed. 339.

Assignments II and IV go to the question of the court's action in overruling defendant's motion for a new trial. The granting or refusal of a new trial is a matter that rests in the sound discretion of the trial court and is not reviewable on a writ of error unless it affirmatively appears from the record that this discretion has been abused .

> "The granting or refusal of a new trial rests in the sound discretion of the trial court and generally is not reviewable on a writ of error."
>
> Zoline's Federal Criminal Law and Procedure, Vol. 1, page 384.
>
> Luderes v. United States, 210 Fed. 419 (9th Circuit).

The above authorities would seem to dispose of assignments II, III, IV, V and VI. However, we will take up the discussion of these assignments on their merits as it is the Government's contention that the evidence of the case was ample to warrant the jury in returning a verdict of guilty against plaintiff in error and that the verdict was entirely consistent and

reasonable. Counsel for plaintiff in error contends that because of the fact that the jury found the defendant Ray W. Hayden not guilty and found the other defendant W. G. Critzer guilty, that the verdict of the jury was inconsistent and should be set aside, counsel's contention in this respect being that it was the Government's contention that the defendant Hayden and Critzer were engaged in a joint enterprise and that Critzer had employed the defendant Hayden to transport the liquor in question and that also under the instructions of the court the jury was required to find that they were engaged in a joint enterprise before they could find the defendant Critzer guilty. These contentions are not correct, it being the theory of the Government that the two defendants were jointly associated in the enterprise but that it was also possible that defendant Critzer was associated with some other person. Furthermore, the court's instructions on this point were quit clear, it being as follows:

> "That the jury must find from the evidence, beyond a reasonable doubt, before they can find the defendant Critzer guilty, that some relationship existed between the defendant Critzer and the defendant Hayden or other driver of the car; that either Hayden or some other driver, was employed by Critzer for or on a contingent basis for transporting said intoxicating liquor, or had joint interest in the transaction, or the defendant Critzer employed him to transport the intoxicating liquor in question, or that Critzer had knowledge that said liquor was to be transported in said car and furnished his car for the unlaw-

> ful enterprise, or that he was aided or assisted by the defendant Hayden, or such other driver, in transporting said intoxicating liquor; and that unless the jury find such facts to exist from the evidence, beyond a reasonable doubt, then they must find the defendant Critzer not guilty."

Under this instruction, it can be seen that the jury might have taken different views of the evidence. They might have decided that the defendant Critzer and Hayden were engaged in a joint enterprise or that the defendant Critzer and some other driver or person were engaged in a joint enterprise. They might have been satisfied, as they undoubtedly were, from the evidence, that plaintiff in error was involved in the crime but that they entertained some doubt as to whether Hayden was the driver of the car. Taking this view of the case it would be entirely reasonable and consistent for the jury to find the defendant Critzer guilty and the defendant Hayden not quilty. Question of the connection of the two defendants with the commission of the crime was manifestly a question for the jury to decide. We know of no authorities and none is cited by counsel for plaintiff in error to the effect that where two defendants are jointly charged with the commission of a crime, and where the jury is satisfied of the connection of one of the defendants with the commission of that crime, that that defendant must be found not guilty should they entertain a reasonable doubt as to the other de-

fendant. This in brief is the position of counsel in his last assignment of error.

In conclusion it is respectfully urged that no error was committed by the trial court in the respect urged by plaintiff in error and that the evidence was sufficient for the case to be given to the jury and sufficient for the jury to base a verdict of guilty as to the plaintiff in error and entirely consistent even though the other defendant was found not guilty. We accordingly pray an affirmance of the judgment.

Respectfully submitted,

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